ORIGINAL

No. 92-8579

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1992

CHARLES K. ELDER,

Petitioner,

v.

R. D. HOLLOWAY, OTHER UNKNOWN EMPLOYEES AND/OR AGENTS, individually and in their official capacity as police officers for the Ada County Sheriff's Office, et al,

Respondents.

Petition for a Writ of Certiorari
To The United States Court of Appeals
For the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

John C. Lynn
LYNN, SCOTT, HACKNEY & SULLIVAN
1015 W. Hays Street
Boise, Idaho 83702
Telephone: (208) 342-7600

Counsel of Record for Petitioner

QUESTIONS PRESENTED FOR REVIEW

The Panel's opinion below, from which the Ninth Circuit refused to consider en banc, establishes the "Elder rule" (see Reinhardt dissent, Order and Dissents, filed January 27, 1993 - Appendix 2). The Elder rule sets forth the proposition that in considering a civil rights plaintiff's challenge to a state official's qualified immunity defense, appellate courts may not consider cases or precedents which the plaintiff failed to cite to the district court. Therefore, the question presented here is whether a party on appeal may rely only on those authorities cited to the district court.

PARTIES TO THE PROCEEDINGS IN THE COURT OF APPEALS

The parties to the proceedings in the United States Court of Appeals for the Ninth Circuit, the Order of which is here for review, include:

1. Petitioner Charles K. Elder, Appellant in the Court of Appeals; and
2. Respondents R.D. Holloway, other unknown employees and/or agents, individually and in their official capacity as police officers for the Ada County Sheriff's Office, et al, Appellees in the Court of Appeals.

TABLE OF CONTENTS

QUESTIONS PRESENTED FOR REVIEW	i
PARTIES TO THE PROCEEDINGS IN THE COURT OF APPEALS	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	iv
INTRODUCTION	1
OPINIONS BELOW	2
JURISDICTION	2
STATUTORY AND CONSTITUTIONAL PROVISIONS	2
STATEMENT OF THE CASE	3
ARGUMENT FOR ALLOWANCE OF WRIT	5
CONCLUSION	8

APPENDIX

A. Opinion of the Panel, filed December 19, 1991

B. Order and Dissents denying Appellant's Petition for Rehearing and rejecting suggestion for rehearing en banc, filed January 27, 1993

C. U. S. District Court Memorandum Opinion and Order, filed November 21, 1990

TABLE OF AUTHORITIES

Anderson v. Creighton, 483 U.S. 635 (1987)	6
Backlund v. Barnhart, 778 F.2d 1386 (9th Cir. 1985)	7
Davis v. Scherer, 468 U.S. 183 (1984)	6
Duncan v. Storie, 869 F.2d 1100 (8th Cir., cert. denied, 493 U.S.852, 110 S.Ct. 152 (1989)	5
Harlow v. Fitzgerald, 457 U.S. 800 (1982)	6
Hunter v. Bryant, 112 S.Ct. 534 (1991)	6
Mitchell v. Forsyth, 472 U.S. 511 (1985)	6
Scoggins v. State, 276 Ark. 177, 633 S.W.2d 33 (1982)	5
Seigert v. Gilley, 111 S.Ct. 1789 (1991)	6
State v. Holeman, 103 Wash.2d 426, 693 P.2d 89 (1985)	5
U.S. v. Al-Azzawy, 78 F.2d 890 (9th Cir. 1985)	4, 5, 6
28 U.S.C. §1254(1)	2
42 U.S.C. §1983	2, 4
Fourth Amendment, United States Constitution	3
Fourteenth Amendment, United States Constitution	3

No. _____

_____ ♦ _____

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1992

CHARLES K. ELDER,

Petitioner,

v.

R. D. HOLLOWAY, OTHER UNKNOWN EMPLOYEES AND/OR AGENTS, individually and in their official capacity as police officers for the Ada County Sheriff's Office, et al,

Respondents.

_____ ♦ _____

Petition for a Writ of Certiorari To The United States Court of Appeals For the Ninth Circuit

_____ ♦ _____

PETITION FOR A WRIT OF CERTIORARI

_____ ♦ _____

INTRODUCTION

Pursuant to Part III of the Rules of this Court, Charles K. Elder petitions this Court to issue a writ of certiorari to the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The panel Opinion of the Court of Appeals issued in support of its judgment is reported and appears in the Appendix A hereto. The Order and Dissents by the panel denying Appellant's petition for rehearing and rejection of the suggestion for rehearing en banc is reported and appears in the Appendix B hereto.

JURISDICTION

The Court of Appeals entered its Order and Dissents denying Appellant's petition for rehearing and rejection of the suggestion for rehearing en banc on January 27, 1993. This petition is therefore timely under this Court's Rule 13.4. This Court has jurisdiction to review the judgment of the Court of Appeals under 28 U.S.C. §1254(1).

STATUTORY AND CONSTITUTIONAL PROVISIONS

42 U.S.C. §1983:

Every person who, under color of any statute, ordinance, regulation, custom or usage of any State or Territory or the District of Columbia, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action of law, suit in equity, or other

proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

Fourth Amendment

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Fourteenth Amendment

...No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law...

STATEMENT OF THE CASE

The underlying factual context of this case is relatively simple. The Defendant police officers surrounded Elder's house in an effort to arrest him without an Idaho warrant. The officers ordered Elder to come out of the house. He did so after suffering epileptic seizures inside. He stood on the threshold of the

doorway and before anyone could reach him, he fell to the ground, suffering a massive subdural hematoma, which ultimately rendered him partially paralyzed.

Elder sued under 42 U.S.C §1983, alleging a Fourth Amendment violation as applied to the States under the Fourteenth Amendment. Essentially, he claimed that he had a right not to be arrested without a valid warrant. The Defendants moved for summary judgment on the grounds of qualified immunity, that is, the law was not clearly established that Elder was arrested inside the home, even though the officers remained outside ordering Elder out. The District Court granted the Defendants' motion, ruling that the law was not clearly established. However, one case directly on point had clearly established the law (United States v. Al-Azzawy, 784 F.2d 890 (9th Cir. 1985)), but was not cited by the parties nor found by the District Court.

The case was appealed to the Ninth Circuit solely on the issue of qualified immunity. The three-member panel conceded that the law was clearly established to the Plaintiff's benefit under Al-Azzawy (supra), but refused to reverse on the ground that the Plaintiff had failed to bear the burden of showing the law was clearly established. In other words, the failure of Plaintiff to cite Al-Azzawy (supra) to the District Court was fatal, even though the legal basis of Plaintiff's claim was clearly established.

Plaintiff then petitioned for rehearing and suggested rehearing en banc. This was denied with a lengthy dissent by Judges Kozinski and Reinhardt.

ARGUMENT FOR ALLOWANCE OF WRIT

By establishing the "Elder rule", which essentially requires the civil rights plaintiff's attorney to cite the established prior case on point or lose on qualified immunity, the panel has decided a federal question in a way that conflicts with applicable decisions of the Court. Thus, this case falls squarely within the criteria of Rule 10.1(c).

Petitioner cannot embellish on the eloquent and prescient dissents of Judges Kozinski and Reinhardt below (Appendix B). These opinions not only outline the flawed reasoning of the panel's decision, but highlight the unfair ramifications of a rule that harshly penalizes the civil rights plaintiff whose attorney has not found the precise case on point.

The fact of the matter is that Petitioner cited three cases on point to the District Court - State v. Holeman, 103 Wash.2d 426, 693 P.2d 89 (1985), Scoggins v. State, 276 Ark. 177, 633 S.W.2d 33 (1982) and Duncan v. Storie, 869 F.2d 1100 (8th Cir., cert. denied, 493 U.S. 852, 110 S.Ct. 152 (1989). Duncan (supra) is particularly germane on the issue of whether the arrestee came outside the home voluntarily, that is, "an individual who is compelled to stand in a doorway cannot be lawfully arrested without the existence of probable cause and exigent circumstance" (Duncan at 1102). This was precisely the situation with Mr. Elder. He was ordered to exit the house and complied with that order. Unfortunately, these authorities were not sufficiently on point for the District Court.

The case of United States v. Al-Azzawy, 784 F.2d 890 (9th Cir.

1985), cert. denied, 476 U.S. 1144 (1986) was sufficiently on point from the viewpoint of the panel. However, this case primarily dealt with the exigent circumstances exception to the warrant requirement - an issue considered by the District Court and deemed to be a matter for jury resolution. Although the legal principle upon which Petitioner rested his case was established by Al-Azzawy (supra), it was not cited or otherwise made known to the District Court. Therefore, Petitioner was unable to rely on it as establishing the law and precluding summary judgment. Thus, the panel's ruling transmogrified the focus of qualified immunity from what was clearly established as the time of the claimed wrongdoing to what authorities were presented to the District Court.

The panel comes to this conclusion by extracting a phrase from Davis v. Scherer, 468 U.S. 183 (1984): "a plaintiff who seeks damages for violation of constitutional or statutory rights may overcome the defendant official's qualified immunity only by showing that these rights were clearly established..." (Id. at 197). The panel misinterprets this phraseology as requiring the plaintiff to prove the law as one would prove the facts.

This interpretation is contrary to Harlow v. Fitzgerald, 457 U.S. 800 (1982), Mitchell v. Forsyth, 472 U.S.511 (1985), Seigert v. Gilley, 111 S.Ct. 1789 (1991), Anderson v. Creighton, 483 U.S. 635 (1987) and Hunter v. Bryant, 112 S.Ct. 534 (1991). None of these cases stand for the proposition that a civil rights plaintiff loses if the right case or cases were not submitted to the District Court. The panel treats the showing aspect of Davis (supra) as if

civil rights plaintiffs win or lose on the basis of whether their attorneys submit the right case or cases. This is an absurd approach to the quest for justice.

None of the panel's rationalizations for its bizarre interpretation of the above cases makes any sense. The assertion that courts look to the cases cited by civil rights plaintiffs for a determination of clearly established law adds nothing to the legal inquiry. Backlund v. Barnhart, 778 F.2d 1386 (9th Cir. 1985) noted that the plaintiffs failed to cite pertinent authority, but this did not end the matter. The Backlund (supra) court did not limit its analysis to plaintiffs' cases, but considered a host of other authorities in pursuit of its role as a court.

The so-called analogous rules cited by the panel which penalize a party for not raising a legal issue are not at all of like nature to what is now the Elder rule. For example, the F.R.C.P. 51 requires contemporaneous objections to jury instructions to ensure the court utilizes the correct instruction and prevent the silent party from clamoring error on appeal. The other rules cited by the panel were designed to remedy a specific problem or promote efficient judicial time - none subvert the primary aim of the court system, justice for all, like the newly created Elder rule.

CONCLUSION

The Elder rule as announced by the panel greatly discredits the federal court system. The strained reasoning behind the rule is flawed and unsupported by prior caselaw and makes no sense. Its effect is to greatly diminish the rights of civil rights plaintiffs to have their case heard by a jury and to allow irresponsible governmental officials to escape accountability by the sheer fortuity of whether the right case has been cited as if justice were a grade on a law school exam. The Elder rule should not be left to the lower courts to grapple and distinguish, but overturned directly because the philosophy embodied in it cannot be reconciled with the overall point of legal process - vindicating rights.

For these compelling reasons, this Court should grant Elder's petition and issue a writ of certiorari.

Respectfully submitted,

JOHN C. LYNN
1015 W. Hays Street
Boise, Idaho 83702
(208) 342-7600

Attorney of Record for Petitioner

ORIGINAL

No. 92-8579

In The

SUPREME COURT OF THE UNITED STATES

April Term, 1993

Supreme Court, U.S.
FILED
APR 19 1993
OFFICE OF THE CLERK

RECEIVED
APR 19 1993
OFFICE OF THE CLERK
SUPREME COURT, U.S.

CHARLES K. ELDER,

Petitioner,

v.

RECEIVED
MAY 3 1993
OFFICE OF THE CLERK
SUPREME COURT, U.S.

R. D. HOLLOWAY, OTHER UNKNOWN EMPLOYEES AND/OR AGENTS, individually and in their official capacity as police officers for the Ada County Sheriff's Office, et al,

Respondents.

Petition for a Writ of Certiorari To The United States Court of Appeals For the Ninth Circuit

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

John C. Lynn
LYNN, SCOTT, HACKNEY & SULLIVAN
1015 W. Hays Street
Boise, Idaho 83702
Telephone: (208) 342-7600

Counsel of Record for Petitioner

The Petitioner, Charles K. Elder, asks leave to file the attached petition for a writ of certiorari without prepayment of costs and to proceed to forma pauperis. Petitioner has not previously been granted leave to so proceed in both the U. S. District Court and U. S. Court of Appeals. Petitioner's Affidavit in support of this motion is attached hereto.

DATED This 16 day of April, 1993.

LYNN, SCOTT, HACKNEY & SULLIVAN

By: _____
JOHN C. LYNN
1015 W. Hays Street
Boise, Idaho 83702
Telephone: (208) 342-7600

Attorney for Petitioner

No. _____

_____ ♦ _____

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1992

CHARLES K. ELDER,

Petitioner,

v.

R. D. HOLLOWAY, OTHER UNKNOWN EMPLOYEES AND/OR AGENTS, individually and in their official capacity as police officers for the Ada County Sheriff's Office, et al,

Respondents.

_____ ♦ _____

Petition for a Writ of Certiorari To The United States Court of Appeals For the Ninth Circuit

_____ ♦ _____

AFFIDAVIT IN SUPPORT OF A MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

_____ ♦ _____

John C. Lynn
LYNN, SCOTT, HACKNEY & SULLIVAN
1015 W. Hays Street
Boise, Idaho 83702
Telephone: (208) 342-7600

Counsel of Record for Petitioner

STATE OF IDAHO)
:ss
County of Ada)

I, CHARLES K. ELDER, Being first duly sworn, depose and say that I am the petitioner in the above-entitled case; that in support of my motion to proceed without being required to prepay fees, costs or give security therefor, I state that because of my poverty, I am unable to pay the costs of this case or to give security therefor; and that I believe I am entitled to redress.

I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the cost of proceeding in this Court are true.

1. Are you presently employed? Yes ____ No _x_

   Petitioner is divorced and not presently employed and is disabled, receiving benefits from the Social Security Administration in the amount of $640.00 per month and from the Veterans' Administration in the amount of $85.0 per month.

2. Have you received within the past twelve months any income from a business, profession or other form of self-employment, or in the form of rent payments, interest, dividends or other sources?

   Yes _x_ No ____

   Petitioner received approximately $200.00 from PRIDE (Division of Association for Retarded Persons).

3. Do you own any cash or checking or savings account?

   Yes ____ No _x_

   a. If the answer is yes, state the total value of the items owned. N/A

4. Do you own any real estate, stocks, bonds, notes, automobiles or other valuable property (excluding ordinary household furnishings and clothing)?

   Yes _x_ No ____

Petitioner owns a 1979 Chrysler Cordova automobile, valued at $300.00.

5. List the persons who are dependent upon you for support and state your relationship to those persons.

Rebecca Elder, age twelve, daughter; Social Security provides $268.00 per month because of Petitioner's disability.

I understand that a false statement or answer to any question in this affidavit will subject to me penalties for perjury.

DATED This 15 day of April, 1993.

Charles K. Elder
CHARLES K. ELDER

SUBSCRIBED AND SWORN TO Before me this 15 day of April, 1993.

Notary Public for Idaho
Residence: Meridian ID
My Commission Expires: 1999

DATED This 16 day of April, 1993.

LYNN, SCOTT, HACKNEY & SULLIVAN

By: John C. Lynn
JOHN C. LYNN
1015 W. Hays Street
Boise, Idaho 83702
Telephone: (208) 342-7600

Attorney for Petitioner

APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

CHARLES K. ELDER; BEVERLY S. ELDER, husband and wife,
Plaintiffs-Appellants,
v.
R. D. HOLLOWAY; OTHER UNKNOWN EMPLOYEES AND/OR AGENTS, individually and in their official capacity as police officers for the Ada County Sheriff's Office, et al.,
Defendants-Appellees.

No. 91-35146
D.C. No. CV-88-1329-HLR
OPINION

Appeal from the United States District Court for the District of Idaho
Harold L. Ryan, District Judge, Presiding

Argued and Submitted
October 8, 1991—Seattle, Washington

Filed December 19, 1991

Before: J. Clifford Wallace, Chief Judge, Procter Hug, Jr. and Pamela Ann Rymer, Circuit Judges.

Opinion by Judge Rymer

SUMMARY

Courts and Procedure/Constitutional Law

Affirming a district court grant of summary judgment, the court of appeals held that the grant of summary judgment,

because there are legal authorities that plaintiff did not present to the district court or to us on appeal which suggest that, contrary to what the district court found, the law was clearly established at the time of the incident. Because the plaintiff bears the burden of proof on the issue, we affirm.

After receiving word that Charles Elder, who was wanted on Florida warrants and considered dangerous, was in town, officer R.D. Holloway and others in the Ada County Sheriff's Office made plans to arrest him outside his place of work. Elder [illegible] his brother William got wind of the officers' plans, howev[illegible] left work early, and returned to William's house (where Elder was living, too). Holloway and a number of other officers set up surveillance at the house. When William tried to ride away on horseback, he was detained. Officers found out that Elder had access to weapons in the house. Eventually, Holloway and William made telephone contact with Elder, who meanwhile had suffered two epileptic seizures. Holloway advised him that if he was unable to walk out of the house, he should crawl. Elder walked out a few minutes later, but fell face down, hitting his head and sustaining severe injuries. This happened on April 27, 1987.

Elder's 42 U.S.C. § 1983 action claims these events violated his constitutional right not to be arrested in his home without a valid Idaho warrant. Holloway's motion for summary judgment on the ground of qualified immunity was grante[illegible] cause the court found no Idaho or Ninth Circuit law that ad[illegible]ssed the issue of whether a valid Idaho warrant was necessary to make a "constructive entry" into a home to arrest an occupant.

As the trial judge's memorandum opinion and order notes, Elder cited two cases to the court, *State v. Holeman*, 103 Wash. 2d 426, 693 P.2d 89 (1985), and *Scroggins v. State*, 276 Ark. 177, 633 S.W.2d 33 (1982). Based on these cases and its reading of *Payton v. New York*, 445 U.S. 573, 100 S. Ct. 1371, 63 L. Ed. 2d 639 (1980), the district court concluded

that the law was not clear on the issue of "constructive crossing of the threshold." Accordingly, it ruled in Holloway's favor on qualified immunity.

[1] We have no difficulty with the district court's decision on the record it was presented. Neither case Elder relied upon clearly established whether an arrest takes place inside or outside the home, when the suspect is inside but is summoned outside by law enforcement officers who have surrounded the premises.

[2] There was, however, Ninth Circuit authority, long in place, which is closely on point and could make a difference in the outcome of this case. In *United States v. Al-Azzawy*, 784 F.2d 890 (9th Cir. 1985), *cert. denied*, 476 U.S. 1144, 106 S. Ct. 2255, 90 L. Ed. 2d 700 (1986), police surrounded the suspect's house and, with weapons drawn, ordered him to leave. When he emerged, he was taken into custody. We held that, even though he had exited the house and was physically seized outside, he "was arrested inside his residence without a warrant." *Id.* at 893. In so holding, we reaffirmed the rule that "'it is the location of the arrested person, and not the arresting agents, that determines whether an arrest occurs within a home.'" *Id.* (quoting *United States v. Johnson*, 626 F.2d 753, 757 (9th Cir. 1980), *aff'd on other grounds*, 457 U.S. 537, 102 S. Ct. 2579, 73 L. Ed. 2d 202 (1982)). The Sixth Circuit had also held to the same effect in *United States v. Morgan*, 743 F.2d 1158, 1166-67 (6th Cir. 1984), *cert. denied*, 471 U.S. 1061, 105 S. Ct. 2126, 85 L. Ed. 2d 490 (1985).[1] Thus, that principle was clearly established at the time of Elder's arrest.[2]

[1]The Eighth Circuit is now in accord, *see Duncan v. Storie*, 869 F.2d 1100 (8th Cir.), *cert. denied*, 493 U.S. 852, 110 S. Ct. 152, 107 L. Ed. 2d 110 (1989). However, *Duncan* was handed down after the incident at issue in this case. Therefore, it is not relevant on the question of Holloway's good faith belief, and Elder's reliance on it on appeal is inappropriate.

[2]*Al-Azzawy* went on to hold that exigent circumstances justified the warrantless arrest. 784 F.2d at 894. Holloway urges that no matter what, this renders the law uncertain. Given our disposition, it is not necessary to resolve this question.

BEST AVAILABLE COPY

properly granted, was not to be reversed simply because there were legal authorities not cited by appellant to the district court or to the appeals court suggesting that, contrary to what the district court found, the law was clearly established at the time of the incident.

Appellant Charles K. Elder was ordered out of the place where he was residing through telephone contact by two police officers. Meanwhile, Elder had suffered two epileptic seizur[illegible] One of the officers advised Elder that if he was unabl[illegible] walk out of the house, he should crawl. Elder walked out a few minutes later, but fell face down, hitting his head and sustaining severe injuries. Elder brought a Section 1983 action, claiming these events violated his constitutional right not to be arrested in his home without a valid Idaho warrant. The officer's motion for summary judgment on the ground of qualified immunity was granted because the court found no Idaho or Ninth Circuit law that addressed the issue of whether a valid Idaho warrant was necessary to make a "constructive entry" into a home to arrest an occupant. The district court concluded that the law was not clear on the issue of constructive crossing of the threshold.

[1] Neither case Elder relied upon clearly established whether an arrest takes place inside or outside the home, when the suspect is inside but is summoned outside by law enfo[illegible]ent officers who have surrounded the premises. [2] Howe[illegible], there was Ninth Circuit authority, long in place, that is closely on point and could make a difference in the outcome of this case. In *Al-Azzawy*, the court reaffirmed the rule that it is the location of the arrested person, and not the arresting agents, that determines whether an arrest occurs within a home. [3] Elder did not call this case or others to the attention of the district court. Thus, the court could not now reverse the grant of summary judgment.

[4] First, a Section 1983 plaintiff bears the burden of showing that the constitutional right purportedly violated was

clearly established at the time of the official's conduct. [5] Second, the appeals court never considers facts not presented to the trial court. Similarly, legal issues not raised or ruled upon in the district court are not considered on appeal. [6] Third, to reverse on account of law that could and should have been known to counsel at the time the summary judgment motion was under consideration would violate the spirit of the first rule of the Federal Rules of Civil Procedure. [7] Fourth, given the hybrid nature of the issue, and the fact that the plaintiff has the burden of showing that the law was clearly established, for the court to step in now would have the effect of putting the court on counsel's legal staff. [8] Finally, in this case the court could not say that injustice had occurred. Neither the trial court or counsel found *Al-Azzawy*. Thus, given that failure, the law was sufficiently clear that a reasonable law enforcement officer, like the one in this case, would understand that what he was doing violated a constitutonal right.

COUNSEL

John Charles Lynn, Lynn, Scott & Hackney, Boise, Idaho, for the plaintiffs-appellants.

James J. Davis, Davis, Wright & Tremaine, Boise, Idaho, for the defendants-appellees.

OPINION

RYMER, Circuit Judge:

This appeal raises an unusual question: whether a summary judgment on qualified immunity in favor of a law enforcement officer which was properly granted on the record presented to the district court, should nevertheless be reversed

[3] The problem, of course, is that none of these cases were called to the attention of the district court. The question, therefore, is whether we should now reverse. We conclude that we should not, for the following reasons.

[4] First, we have said that a § 1983 plaintiff bears the burden of showing that the constitutional right purportedly violated was clearly established at the time of the official's conduct. *Baker v. Racansky*, 887 F.2d 183, 186 (9th Cir.). Although the state of the law at the time the incident occurred is a question for the court, rather than a jury, to decide, in the unique context of qualified immunity it is akin to a question of fact. What the law was is inextricably intertwined with the merits of the issue, such that a court cannot properly resolve a police officer's motion for summary judgment without determining whether, on the one hand, the law was clearly established and, on the other, whether the law enforcement official would reasonably have known he was violating the plaintiff's constitutional rights by his conduct on the particular occasion. Unless the plaintiff presents legal authorities that bear on the point, he fails to carry his burden.

[5] Second, it goes without repeating that we never consider *facts* not presented to the district court. *United States v. Elias*, 921 F.2d 870, 874 (9th Cir. 1990). By the same token, we normally do not consider *legal issues* not raised or ruled on in the district court. Examples include those matters that can be urged by way of a Rule 12 motion that are waived unless made with the answer, *see, e.g.*, Fed. R. Civ. P. 12(h)(1) (defenses of lack of personal jurisdiction, improper venue, insufficiency of process, and insufficiency of service of process waived if omitted from pre-answer motion, if any, or answer); *Benny v. Pipes*, 799 F.2d 489, 492 (9th Cir. 1986) (A "general appearance or responsive pleading by a defendant that fails to dispute personal jurisdiction will waive any defect in service or personal jurisdiction."), *amended on other grounds*, 807 F.2d 1514 (9th Cir.), *cert. denied*, 484 U.S. 870, 108 S. Ct. 198, 98 L. Ed. 2d 149 (1987); *Chilicky v. Schweiker*, 796 F.2d 1131, 1135-36 (9th Cir. 1986) (if party files pre-answer motion but fails to raise defense of lack of personal jurisdiction in that motion, defense is waived), *rev'd on other grounds*, 487 U.S. 412, 108 S. Ct. 2460, 101 L. Ed. 2d 370 (1988); issues that could have been joined by a motion for directed verdict, but cannot be pressed on appeal unless that motion is made, *see, e.g., Gilchrist v. Jim Slemons Imports, Inc.*, 803 F.2d 1488, 1493 (9th Cir. 1986) (sufficiency of evidence not reviewable on appeal unless motion for directed verdict was made in trial court); *United States v. 33.5 Acres of Land*, 789 F.2d 1396, 1400 (9th Cir. 1986) (same, but noting limited exception for plain error resulting in manifest miscarriage of justice); and errors in instructions that are waived unless an objection is timely made or instructions reflecting contrary law are submitted before the jury goes out, *see e.g.*, Fed. R. Civ. P. 51 (no party can challenge jury instructions on appeal unless objection made before jury retires); *Hammer v. Gross*, 932 F.2d 842, 847-48 (9th Cir.) (en banc) (party cannot challenge jury instructions on appeal if not objected to in district court prior to jury retiring; there is no plain error exception to this rule), *cert. denied*, 60 U.S.L.W. 3154 (Dec. 2, 1991). Furthermore, the relevant record on review of summary judgments is the record as it existed at the time the motion was considered. *Harkins Amusement Enter., Inc. v. General Cinema Corp.*, 850 F.2d 477, 482 (9th Cir. 1988), *cert. denied*, 488 U.S. 1019, 109 S. Ct. 817, 102 L. Ed. 2d 806 (1989). We see no meaningful distinction between these procedures and this one.

[6] Third, for us to reverse on account of law that could and should have been known to counsel at the time the summary judgment motion was under consideration would violate the spirit of the first rule of the Federal Rules of Civil Procedure. Rule 1 mandates that the rules "be construed to secure the just, speedy, and inexpensive determination of every action." This includes Rule 56 on summary judgments. In this case, a summary judgment was entered that is arguably erroneous because the person with the burden to do so, failed to find or produce relevant Ninth Circuit authority. Had he done so at the right time and in the right forum, the adverse judgment might have been avoided. So, too, would this appeal. In these circumstances, failing to hold Elder to the case he chose to present would fly in the face of Rule 1.

[7] Fourth, given the hybrid nature of the issue, and the fact that the plaintiff has the burden of showing that the law was clearly established, for us to step in now would have the effect of putting the court on counsel's legal staff. We have great concern that this does not comport with our overriding obligation to be fair and impartial to all sides. More significantly, to reverse because of legal authority not called to the attention of the district court, when the state of the law is the heart of the qualified immunity issue on summary judgment, would necessarily mean that we expect the district court to research independently the applicable law whenever qualified immunity is at issue. While to do so is commendable and encouraged, we are reluctant to require it at the cost of reversible error, at least when the error is not so obvious or fundamental as to result in a denial of due process. To impose this burden on a district judge would put him or her back in the business of practicing law, and to that extent implicates the court's impartiality. *Cf. Jacobsen v. Filler*, 790 F.2d 1362, 1365 n.7 (9th Cir. 1986). It would also shift to the court the burden we have put on the plaintiff. That we are bound not to do. *Pratt v. McCarthy*, 850 F.2d 590, 593 (9th Cir. 1988) (only en banc court has power to reject circuit precedent).

[8] Finally, in this case we cannot say that injustice has occurred. Neither counsel nor the court found *Al-Azzawy*. We are hard pressed to conclude that, given that failure, the law was sufficiently clear that a reasonable law enforcement officer in Holloway's shoes would understand that what he was doing violated a constitutional right.

AFFIRMED.

Judges Reinhardt and Kozinski dissent from the failure of the court to rehear the case en banc.

DISSENTS

KOZINSKI, Circuit Judge, with whom Circuit Judges PREGERSON, NORRIS, REINHARDT and TROTT join, dissenting from the order rejecting the suggestion for rehearing en b.

It is not every day that one witnesses the birth of a totally new legal doctrine. And with good reason. Established legal principles, honed over decades — sometimes centuries — generally have much experience and wisdom behind them. Monumental change should be made only for compelling reasons and after careful consideration of all foreseeable consequences.

Despite the opinion's modest language, the panel here has taken quite an extraordinary step. Simply stated, the panel has held that in raising a pure question of law a party may rely on appeal only on those authorities which it cited to the district court. A court of appeals, in turn, must ignore its own (and the Supreme Court's) controlling case law if it was not cited to the [illegible] below. The panel reaches this result by adding a new term to the argot of jurisprudence: "legal facts." The term is as self-contradictory and nonsensical as the doctrine it supports. Because we can ill afford to maintain this precedent as the law of this circuit, I respectfully dissent from the court's refusal to take this case en banc.

I

The underlying facts are simple: Defendants, all police officers, surrounded Charles Elder's house and ordered him to come out. He did come out and was promptly arrested in front

of his house. Elder sued under 42 U.S.C. § 1983, alleging the police violated his Fourth Amendment right to not be arrested in his home without a valid warrant. Defendants moved for summary judgment claiming qualified immunity. To overcome the immunity defense, plaintiff cited a variety of cases to demonstrate that the specific Fourth Amendment right he sued on was clearly established. None of the cases was directly on point, and the district court granted defendants' motion. Unknown to the parties and the district court was *United States v. Al-Azzawy*, 784 F.2d 890 (9th Cir. 1985), *cert. denied*, 476 U.S. 1144 (1986), which showed that the "principle [on which plaintiff rested his case] was clearly established at the time of Elder's arrest." *Elder v. Holloway*, 951 F.2d 1112, 1114 (9th Cir. 1991) (previous version of this opinion).[1]

Whether the right was clearly established at the time of the incident, the majority recognizes, is a "pure question of law." *Elder v. Holloway*, 975 F.2d 1388, 1392 (9th Cir. 1992) (quoting *Romero v. Kitsap County*, 931 F.2d 624, 627-28 (9th Cir. 1991)). It is, of course, well understood that questions of law are reviewed by us de novo, giving no deference to the ruling of the district court. *Pierce v. Underwood*, 487 U.S. 552, 557 (1988); *Bose Corp. v. Consumers Union*, 466 U.S. 485, 501 (1984); *United States v. Silverman*, 861 F.2d 571,

[1]The panel omits this statement from the more recent version of its opinion, but it does nothing to controvert it. This is quite understandable. *Al-Azzawy* is on all fours with this case; our statement that "it is the location of the arrested person, and not the arresting agents, that determines whether an arrest occurs within a home," *Al-Azzawy*, 784 F.2d at 893, was clear, and it applies directly to the claim of qualified immunity raised by the defendants here. Its applicability is undiminished by the panel's suggestion that it "may be regarded as dicta." *Elder*, 975 F.2d at 1391. In fact, the majority's reliance on its newly invented doctrine can only be understood as recognizing that *Al-Azzawy* does make a difference. After all, if *Al-Azzawy* did not change the legal landscape enough to defeat a claim of qualified immunity, it would have been far simpler to dispose of the case on that basis.

FOR PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

CHARLES K. ELDER; BEVERLY S. ELDER, husband and wife,
Plaintiffs-Appellants,
v.
R. D. HOLLOWAY; OTHER UNKNOWN EMPLOYEES AND/OR AGENTS, individually and in their official capacity as police officers for the Ada County Sheriff's Office, et al.,
Defendants-Appellees.

No. 91-35146
D.C. No. CV-88-1329-HLR
ORDER AND DISSENTS

Filed January 27, 1993

Before: J. Clifford Wallace, Chief Judge, Procter Hug, Jr. and Pamela Ann Rymer, Circuit Judges.

Dissents by Judges Kozinski and Reinhardt

ORDER

The panel has voted to deny appellants' petition for rehearing and to reject the suggestion for rehearing en banc.

The full court was advised of the suggestion for rehearing en banc. An active judge requested a vote on whether to rehear the matter en banc. The matter failed to receive a majority of the votes of the nonrecused active judges in favor of en banc consideration. Fed. R. App. P. 35.

The petition for rehearing is DENIED and the suggestion for rehearing en banc is REJECTED.

APPENDIX B

court and the court renders its determination after making an independent assessment of what the law is.

II

We are told that the blind man, when handed the elephant's tail, concluded that the creature looked like a rope. So does the panel err in building a whole theory of qualified immunity law on a paragraph dangling at the end of *Davis v. Scherer*, 468 U.S. 183 (1984). There the Court stated: "A plaintiff who seeks damages for violation of constitutional or statutory rights may overcome the defendant official's qualified immunity only *by showing* that those rights were clearly established at the time of the conduct at issue." *Id.* at 197 (emphasis added). The panel reads the phrase "by showing" as setting a requirement that the clearly established law be proved as one typically proves fact — the way one would show that the light was red or that the banana peel was dark and gritty. But that is not a plausible reading of the Supreme Court's language. Because the Court has elsewhere made it clear that whether a right is clearly established is a question of law, the term "showing" must be construed as it applies to legal issues. The way a party demonstrates (or shows) that it should prevail in its legal argument is by citation and argument (which are judged only after a court has made an independent examination of the law), not by testimony and documentary proof.

Had the Court meant to adopt the rule that legal issues in qualified immunity cases are to be proved as facts, it would surely have used clearer language to explain what it was doing. It would not have adopted a major change like this merely by using the word "showing" and then hoping the lower courts would notice its word choice and make the connection — a connection no court actually made for eight years, until this panel suddenly perceived it. The Court would have also provided some rationale or explanation for adopting such a startling new rule. It certainly would not have adopted it without any discussion at all.

A. To understand the significance of the phrase on which the panel relies we must consider it in the context of both the entire *Davis* opinion and the legal backdrop against which it was placed. I start by noting that *Davis* never purported to alter the objective test for qualified immunity first announced in *Harlow v. Fitzgerald*, 457 U.S. 800 (1982). *Davis* applied the test unchanged, quoting it in full before it went through its qualified immunity analysis. *See Davis*, 468 U.S. at 191 (quoting *Harlow*, 457 U.S. at 818). This express restatement of *Harlow* shows that the concluding paragraph in *Davis* — a brief epilogue restating the qualified immunity test — meant simply to reassert *Harlow*, not alter it.[3]

Harlow held that government officials "are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." 457 U.S. at 818. This "qualified immunity defense depends upon the 'objective reasonableness of [the defendant official's] conduct as measured by reference to clearly established law.' No other circumstances are relevant . . . ." *Davis*, 468 U.S. at 191 (citation omitted) (quoting *Harlow*, 457 U.S. at 818). Two aspects of the *Harlow* test call into question the panel's reading of *Davis*.

First, *Harlow* says nothing about the plaintiff having to prove up the law; in fact, it clearly intends that the court make an independent determination of the law: "On summary judgment, the *judge appropriately may determine*, not only the currently applicable law, but *whether the law was clearly established* at the time an action occurred." 457 U.S. at 818 (emphasis added). Thus, *Harlow* gave the court the responsibility to determine whether the law was clearly established. Neither *Harlow* nor *Davis* ever indicated that the plaintiff is

[3]In fact, *Davis* clarified *Harlow*; I take that up below. *See* pp. 586-87 *infra*.

576 (9th Cir. 1988) ("Under the de novo standard of review, we do not defer to the lower court's ruling but freely consider the matter anew, as if no decision had been rendered below.").

The reason for de novo review of legal questions is obvious enough: We are in a better position than the district court to resolve legal questions. We "are not encumbered, as are trial judges, by the vital, but time-consuming, process of hearing evidence." *United States v. McConney*, 728 F.2d 1195, 1201 (9th Cir.) (en banc), *cert. denied*, 469 U.S. 824 (1984). We see many legal issues repeatedly, giving us a greater familiarity with the subject matter. We also have the advantage of sitting in panels where we can deliberate about legal issues. Even the en banc process (which failed us here) lets us talk to each other about issues that the district court must decide alone.

When it comes to facts, however, the district court has an institutional advantage. It can observe witnesses, hear their testimony, and see and touch the physical evidence. Our review of questions of fact is therefore very limited. This leaves resolving questions of law — if necessary, by writing opinions that refine, clarify and develop existing legal doctrines — as our principal mission.

In these defined areas of responsibility, the panel's holding is a true anomaly. According to the panel, because the plaintiff in a qualified immunity case has the burden of showing the defendant violated clearly established law, the relevant law on that point becomes a fact — a legal fact — which the plaintiff must prove up in the district court. But there is nothing about qualified immunity that requires or permits treating the law as fact. Facts by their nature are case specific. They must be proven through witnesses or documentary evidence; the proof is subject to skeptical review by the trier of fact who may not accept all that is put in front of him. Law is external to any particular case; it is not subject to evaluation by the trier of fact; it can be raised for the first time on appeal

because it need not — cannot — be established by use of percipient witnesses or documentary evidence.

Every issue in every case turns on both fact and law; facts outside a legal framework are as irrelevant as abstract legal principles. When we say, for example, that the plaintiff must prove certain facts at trial, we mean he must first establish what the law is and then conform his proof to the applicable legal standard.[2] If the plaintiff misunderstands the law, he may well prove up the wrong set of facts. The failure to get the law right in such a case may then be fatal, not because law is fact, but because a party can't supplement the record on appeal once it discovers that it missed the legal target in the district court. It is quite another matter to say, as the panel does, that even though the facts proved in the district court would be sufficient to defeat a claim of qualified immunity under the existing law, the party might lose because it forgot to cite the correct case below.

The panel's misguided ruling shifts the focus of the qualified immunity inquiry from the clarity of the law actually violated by the defendants to the clarity of the law as presented by the plaintiff to the district court. Thus, under the panel's opinion, a government official's conduct is not evaluated under the standard announced by the Supreme Court — *the clearly established law* at the time the official acted — but on the basis of what case law the plaintiff's lawyer managed to dredge up and cite below. This is a drastic departure from the way questions of law are decided and reviewed in our system, where the adversaries present their versions of the law to the

[2]If it turns out that the plaintiff misunderstands the law and, as a consequence, misleads the district court, we may well limit the scope of our judicial review. *See* pp. 592-94 *infra*. But we most assuredly do not say that the plaintiff has failed to meet his burden of proof because he did not cite a particular case to the district court; we certainly do not say that the appeal *must* be determined as if no other law existed than what was cited to the district court.

appeal. 472 U.S. at 527. In holding that an immunity determination was a separate right, the Supreme Court explained the role of an appellate court in reviewing a qualified immunity claim:

> An appellate court reviewing the denial of defendant's claim of immunity need not consider the correctness of the plaintiff's version of the facts, nor even decide whether the plaintiff's allegations actually state a claim. *All it need determine is a question of law: whether the legal norms allegedly violated by the defendant were clearly established at the time of the challenged actions* . . . . To be sure, the resolution of these legal issues will entail *consideration of the factual allegations that make up the plaintiff's claim for relief* . . . . [T]he Court has recognized that a question of immunity is separate from the merits of the underlying action for purposes of the *Cohen* test even though a reviewing court *must consider the plaintiff's factual allegations in resolving the immunity issue.*

472 U.S. at 528-29 (emphasis added). *Mitchell* makes clear that the court considers "the factual allegations that make up the plaintiff's claim," not the factual allegations plus the limited "universe of statutory or decisional law" presented to the district court. *See* 975 F.2d at 1392. There is no hint in *Mitchell*'s formula that a reviewing court should analyze anything other than the allegations of official misconduct — *factual* allegations — presented to the district court when determining whether the conduct violated clearly established law.

In *Siegert v. Gilley*, 111 S. Ct. 1789 (1991), despite a three-way split on the merits, the Justices agreed on one point: It was the *facts* Siegert alleged, not any particular cases he happened to cite — or not cite — in support of his claim, that mattered for purposes of deciding the qualified immunity question. The Justices seemed perfectly willing to use their own resources to determine and explain what the law was. The majority wrote: "The *facts alleged* by Siegert cannot, in the light of our decision in *Paul v. Davis* be held to state a claim for denial of a constitutional right." *Id.* at 1794 (emphasis added). Focusing on the malice element requisite to Siegert's constitutional claim, Justice Kennedy said: "Upon the assertion of a qualified immunity defense the plaintiff must put forward specific, nonconclusory *factual allegations* which establish malice, or face dismissal. . . . In my view petitioner did not meet the burden of *alleging facts* from which malice could be inferred by other than the most conclusory allegations." *Id.* at 1795 (emphasis added). The dissent said something very similar: "The majority contends that Siegert has not alleged the violation of any 'right,' 'clearly established' or otherwise. In my view, there can be no doubt that *the conduct alleged* deprived Siegert of a protected liberty interest and that this right was clearly established at the time Gilley wrote his letter. Siegert's claim, therefore should surmount Gilley's assertion of qualified immunity." *Id.* at 1797 (emphasis added) (Marshall, J., dissenting). Not one of the opinions purported to limit its analysis to the cases cited by Siegert to the district court. The phrase "legal facts" appears nowhere in the opinion.

Other post-*Davis* Supreme Court qualified immunity cases follow the same pattern. *See, e.g., Anderson v. Creighton*, 483 U.S. 635 (1987); *Hunter v. Bryant*, 112 S. Ct. 534 (1991). In none of the Court's qualified immunity analyses is there support for the panel's rule that a section 1983 (or *Bivens*) plaintiff loses on appeal if, though his factual allegations show a violation of clearly established law, he did not cite the right case to the district court to prove that the law was clearly established. Of course, in trying to persuade the court, a plaintiff will want to cite precedents that support his claim that the law the defendant violated was clear. But this doesn't mean the district court (or we on appeal) "has no obligation," *see* 975 F.2d at 1396, to determine on its own "whether [the] law

obligated to prove up the law or that he waives any authorities not presented to the district court.

Second, the panel's rule is inconsistent with the rationale underlying the *Harlow* test. *Harlow* shifted the inquiry in qualified immunity cases from the subjective good faith of the government officials to the objective reasonableness of their conduct in light of clearly established law. *See id.* at 816-17. The Court settled on this objective test because "[t]he public interest in deterrence of unlawful conduct and in compensation of victims remains protected by a test that focuses on the objective legal reasonableness of an official's acts." *Id.* at 819. The line *Harlow* drew was clear: "Where an official could be expected to know that certain conduct would violate statutory or constitutional rights, he should be made to hesitate; and a person who suffers injury caused by such conduct may have a cause of action." *Id.* at 819. Essential to this inquiry is that the official's conduct be judged against an objective standard — the law as it actually was, not as the official thought it was, or as the plaintiff proves it to be. *Harlow* doesn't say that "officials should be made to hesitate" when plaintiff can cite a case that says they should. Rather, the deterrence is supposed to operate whenever officials *in fact* transgress the actual clear boundaries of the law. *Davis* did nothing to move the inquiry off this fixed reference point.

By misreading *Davis*, the panel bypasses a far more natural interpretation of the relevant language — an interpretation based on the analysis in the body of the opinion. The precise question faced in *Davis* — something the panel never mentions — was whether an immunity defense could be defeated on the ground that the official violated *state* law. The Court answered this question in the negative, but it didn't stop there. *Davis* went on to hold that the violation of clearly established law relevant to the immunity determination must be the same violation as that on which the plaintiff rests his section 1983 claim. In other words, a plaintiff suing for violation of a specific Fourth Amendment right may only defeat the immunity claim if that very Fourth Amendment right was the clearly established one.

With this holding in mind, the meaning of the passage that confuses the panel becomes clear. Consider again the language: "A plaintiff who seeks damages for violation of constitutional or statutory rights may overcome the defendant official's qualified immunity only by showing that *those rights* were clearly established at the time of the conduct at issue." 468 U.S. at 197 (emphasis added). The Court is merely restating its holding by emphasizing that to defeat a qualified immunity claim there must be an identity between the sued-on right and the clearly established right. The language was meant to prevent future plaintiffs from trying, as Scherer did, to sue on one right and to overcome the immunity by showing that some other rights were clearly established. This was the whole point of *Davis*, and the language the panel relies on here merely summarizes this ruling. It is normal practice to restate holdings in conclusions; it is far from normal for a conclusion to make a substantive legal change that is not even considered in the body of the opinion.

B. That *Davis* was not the watershed opinion the panel here reads it to be is evident from the Supreme Court's subsequent qualified immunity decisions. None of these decisions even hint at a requirement that the plaintiff must prove up the law by pleading legal facts. To the contrary, the Court has continued to draw clear distinctions between questions of law and questions of fact.

In *Mitchell v. Forsyth*, 472 U.S. 511, 524-30 (1985), the Court dissected a qualified immunity claim to determine whether a denial of immunity was an appealable order under *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949). The Court considered the nature of an immunity claim in applying the *Cohen* requirement that a claim of right must be "separable from, and collateral to, rights asserted" in the underlying action in order to be appealable in an interlocutory

immunity determinations, the analogy would cut against the panel.

But the analogy just isn't there. The purpose of Rule 51 is to require timely objections to instructions so the trial judge has a chance to change them before the jury retires to consider its verdict. Without it, a party who fails to object to a defective instruction would get two bites at the apple. If the party gets a favorable verdict despite the bad instruction, it wins; if the verdict is unfavorable, the party still has a shot at a new trial appealing on the ground that the instruction was defective. Moreover, the cost of an appellate reversal based on faulty jury instructions — a completely new trial — is obviously very high. With motions for summary judgment based on qualified immunity, on the other hand, there is no incentive to sandbag by failing to point out favorable cases, and the costs of a reversal on an appeal from summary judgment are relatively small.

Equally unhelpful are the other rules the panel cites as supposed analogies. 975 F.2d at 1395 n.4. Each deals with a particular eddy away from the procedural mainstream; none supports the rule adopted here. Rule 12(h)(1), for example, is a procedural tripwire designed to ensure that certain key issues are raised at the very earliest stage of the litigation. Like Rule 51, it embodies an exception, and suggests, if anything, that the opposite is the general rule. In any event, the waiver set up by this rule is limited: It applies to certain, largely factual, defenses each of which is listed within the rule itself. Anyone who files an answer and does not list one of these defenses can fairly be deemed to have waived it; it is a far different matter to say that a plaintiff waives every case in F.2d and the U.S. Reports if he does not mention it in an opposition to a summary judgment motion. The remaining three rules — issues not raised by motion for directed verdict cannot be raised on appeal; facts (factual facts, not legal facts) not presented to the district court cannot be raised on appeal; and review of summary judgment is based on the record as it

existed at the time the motion was considered — all deal with facts, which are within the peculiar competence of the district courts.

For reasons discussed above, *see* pp. 582-84 *supra*, there is simply no analogizing questions of law to questions of fact. Calling it legal fact simply can't, by some peculiar alchemy, turn law into fact. Despite several strained attempts, the panel can find no solid analogy that supports a general rule of waiver of a question of law. This should be an important clue that what we have here is a bold departure from sound and established practice.

IV

The panel's novel rule will serve no one well. Ordinarily, the correct legal result does justice between the parties. By requiring us to ignore the controlling legal precedents and to affirm incorrect legal results, the panel's opinion may require us to affirm many unfair outcomes. The chaotic effects of the panel's rule will not be visited solely on plaintiffs. The government frequently cites cases which run against the general weight of authority in order to show that law which appears to be clearly established is actually muddy. Under *Elder*, if the government fails to cite such a case to the district court, the district court would presumably be free to ignore it, and we would be powerless to reverse the unjust imposition of liability on a government officer.

The panel's ruling also puts attorneys in an extremely awkward position. Under established ethical principles, counsel is required to cite to the district court all binding authorities, not only the favorable ones. Model Rules of Professional Conduct, Rule 3.3(a)(3); Model Code of Professional Responsibility, DR 7-106(B)(1). The same is not true as to facts: A lawyer need not introduce evidence that will defeat his client's claim; it may well be malpractice to do so. But what is a lawyer to do with legal facts? If the majority opinion is read

was clearly established at the time [the] action occurred," *Harlow*, 457 U.S at 818. The court's job is to determine the rights of the parties, not to grade motion papers.

III

In an effort to bring its novel theory into the doctrinal mainstream, the panel points to a variety of rules and practices that, it argues, provide support for its approach. None, in fact, do so.

A. The panel offers this revelation: "While most of our qualified immunity opinions make no mention of who came up with the relevant authority, we have in practice looked to the cases cited by the plaintiff." 975 F.2d at 1393. Of course we have. Much of the time the plaintiff does cite all the relevant cases, so referring to the "cases plaintiff cites" is a useful means of pinpointing a successful argument or rejecting an unsuccessful one. Often we refer to the cases cited by the parties to fulfill our duty to render reasoned decisions that assure the litigants their claims have been given careful consideration. Referring to "the cases the plaintiff cites" is a turn of phrase, not a legal doctrine.

Never have we felt limited to considering only those cases plaintiff cites. *Backlund v. Barnhart*, 778 F.2d 1386 (9th Cir. 1985) — the panel's own showpiece precedent — is a good example: In *Backlund*, the court did note that plaintiffs "fail to cite any pertinent authority" to establish a violated right, *id.* at 1389, but it didn't end its analysis there. Rather, it went on to say: "Nor can [plaintiffs cite any relevant authority], for the following reasons." *Id.* At that point, the court launched into a full-scale analysis of the relevant point of law, without ever hinting that its inquiry was somehow limited by the authorities cited by the plaintiff. Had the *Backlund* court felt itself bound by the cases cited by the plaintiff, all this discussion would have been unnecessary.

Many other qualified immunity cases explicitly go beyond the "universe of authorities" cited by the plaintiff. *See, e.g., Mendoza v. Blodgett*, 960 F.2d 1425, 1431 (9th Cir. 1992) ("No case . . . has been cited to us, *nor have we found any* . . . .") (emphasis added), *petitions for cert. filed*, 61 U.S.L.W. 3303 (Aug. 28, 1992) (No. 92-579) and ___ U.S.L.W. ___ (Nov. 2, 1992) (No. 92-6560); *Maraziti v. First Interstate Bank of California*, 953 F.2d 520, 523 (9th Cir. 1992) ("Maraziti cites no cases, *and we have found none* . . . .") (emphasis added); *Alexander v. Perrill*, 916 F.2d 1392, 1398 (9th Cir. 1990) ("a similar issue [was] previously litigated and decided in [the plaintiff's] favor — *a case which inexplicably both parties failed to cite in their briefs*") (emphasis added). The careful effort in these cases to seek out and consider authorities not cited by the parties is entirely consistent with what I understand to be our role as judges. The panel's ostrich-like insistence that authorities not cited by the plaintiff in the district court may not be considered on appeal is at odds with this body of case law.

B. The panel also cites a variety of rules which penalize a party for failing to raise a legal issue before the district court. 975 F.2d at 1394-95 & n.4. But none of these is actually analogous; none justifies the panel's doctrinal leap.

The panel's principal analogy is to the rule that we will not normally reverse because of an incorrect jury instruction where the party claiming error did not object. But the Federal Rules of Civil Procedure expressly deal with the question of how jury instruction may be reviewed on appeal: "No party may assign as error the giving or the failure to give an instruction unless that party objects thereto before the jury retires to consider its verdict, stating distinctly the matter objected to and the grounds of the objection." Fed. R. Civ. Proc. 51. That the drafters felt it necessary to have a special rule governing this issue suggests that this is the exception from the normal practice. If one could analogize jury instructions to qualified

1201, 1203 (9th Cir. 1989). Applying an unprecedented rule of strict construction to a category of cases where we have a tradition of going out of our way to reach the merits is the sort of procedural legerdemain that might make sense to those trained in the law, but it does nothing to enhance public confidence in our federal courts.

In sum, the panel has lost sight of the fundamental issue in a section 1983 case: whether or not the officials in question violated the rights of citizens. Qualified immunity diminishes somewhat the remedies afforded by law to the allegedly wronged individual, but the standards for a grant of immunity reflect a careful balancing process that takes great pains to protect the plaintiff's substantive rights. In defining qualified immunities, each rule must be judged both in terms of how well it protects the substantive right conferred by the statute, and of how much breathing room it gives government officials who must make hard decisions while performing discretionary functions. The panel's rule does nothing at all to help government officials discharge their responsibilities; its only effect is to diminish the rights of aggrieved plaintiffs. This is hardly the type of balancing the Court has said we must perform in adjudicating civil rights cases.

Conclusion

All those who enter the Supreme Court building are greeted by the words "Equal Justice Under Law." All too often this is only an aspiration. A party's success sometimes depends as much on the skill of his lawyer as on the strength of his case. But the panel here has taken what was heretofore only a necessary evil and elevated it to a rule of law.

Because I believe the panel has taken a giant step in the wrong direction in a very important area of the law, and that it is incumbent on us as a court to correct the error, I respectfully dissent from the order rejecting the suggestion for rehearing en banc.

REINHARDT, Circuit Judge, with whom Circuit Judge Pregerson joins, dissenting from the order rejecting the suggestion for rehearing en banc.

I join Judge Kozinski's excellent, if understated, dissent, and write separately to emphasize one or two additional points. First and foremost — it is civil rights plaintiffs who once again are the object of hostile and discriminatory treatment by the federal courts. *Elder* sets forth the rule that, in considering a civil rights plaintiff's challenge to a state official's qualified immunity defense, appellate courts may not consider cases or precedents which the plaintiff failed to cite to the district court. As Judge Kozinski politely suggests, this is a limitation on appellate review previously unknown in the annals of Anglo-Saxon jurisprudence.

It remains to be seen whether the same bizarre rule will be applied when *defendants* fail to cite cases to the district court — but even if it is, it is clear that in the vast majority of instances, civil rights plaintiffs will bear the brunt of the *Elder* doctrine. First, plaintiffs are obliged by the nature of the principles governing qualified immunity to rely more heavily on case law than are defendants. The primary means open to a plaintiff to demonstrate the clarity of the law violated by a state official, and thus to overcome a qualified immunity defense, is the citation of past cases which have established a given rule or legal principle. Defendants, by contrast, may rely simply on the *absence* of cases clearly establishing the relevant law. Defendants are therefore far less likely to fall victim to a rule which harshly penalizes the omission of a citation. Second, civil rights plaintiffs are at a substantial disadvantage with respect to legal resources. While civil rights defendants are generally represented by a legal office composed of a large number of state or local government attorneys, the overwhelming majority of civil rights plaintiffs are unable to obtain comparable representation. Few are in a position to hire a prestigious law firm with a raft of partners and associates, and only a small number obtain representation by

literally, it would seem counsel would have the right — or even the duty — to keep to himself any case law (i.e., any legal facts) which help the other side. Encouraging such fraud on our district courts will neither make the job of district judges easier nor heighten the level of professional ethics among lawyers.

Finally, the panel's ruling will make it nearly impossible for us to develop a workable body of case law dealing with qualified immunity. Under the panel's opinion, decisions on qualified immunity issues merely represent factual findings based on the "record of authorities" presented to the district court. 975 F.2d at 1394. Every qualified immunity decision will be limited to its particular "facts," a term now defined to include the cited cases. Even if we were to begin the peculiar practice of including in our opinions a list of all the precedents cited to the district court, a given decision would only bind panels reviewing cases in which an identical list of authorities was presented below. Our decisions will no longer say what the clearly established law is, but only whether certain cited cases are sufficient, standing alone, to clearly establish the law. The panel opinion would therefore make it exceedingly difficult, if not impossible, to develop a jurisprudence of what constitutes "clearly established law," and would thereby "Balkaniz[e] the rule of qualified immunity" law — exactly what the Supreme Court wants to avoid. *Anderson v. Creighton*, 483 U.S. 635, 646 (1987).

V

The panel's approach, wrong though it be, does have some intuitive appeal. After all, doesn't fairness to the district judge require that we view the case as he did? Who among us has not felt somewhat betrayed when we were reversed based on an argument not fairly presented to us? "Ah," we may have thought, "had they but put the matter *that* way, I could well have avoided the error."

But the judicial process isn't about fairness to judges; it's about fairness to the parties. While we often speak in terms of "fairly" presenting a matter to the district court, *see, e.g., Royal Printing Co. v. Kimberly-Clark Corp.*, 621 F.2d 323, 328 n.9 (9th Cir. 1980), we do not mean that the court is somehow disadvantaged because a matter was not fairly presented to it. Properly phrased, the question is: Was the matter presented to the district court in a manner fair to the opposing side?

When the question not raised below is factual in nature — which usually means, among other things, that it is peculiarly within the province of one of the parties — we generally say it is not fairly raised if not presented to the court that has competence over factual matters. This stems from the institutional need to build a record before judicial review can be exercised on appeal. But with questions of law, we deem the matter fairly raised if the issue is presented to the district court; citation to a particular case has never been seen as part and parcel of fairly raising the issue below. The district court can, after all, find cases not cited by one party, and the opposing party has the obligation to help the court by presenting relevant precedent to it. Punishing one party so severely for its failure to exhaust all potentially relevant authority may well help district court judges get rid of cases, and give a windfall to parties lucky enough to come across a weak adversary, but it is hardly fair. Determining the law is, after all, a shared responsibility to be borne by the court and the litigants. Where the district judge misses a key precedent and therefore renders an erroneous ruling, the consequences of that error should not be visited entirely on one of the parties.

Finally, the panel's contrary result is also hard to square with our long-standing rule requiring liberal constructions of pleadings in civil rights cases. *See, e.g., Buckey v. County of Los Angeles*, 968 F.2d 791, 794 (9th Cir. 1992), *cert. denied*, 61 U.S.L.W. 3287, 3314, 3394, 3400 (Nov. 30, 1992) (Nos. 92-560 & 92-628); *Gobel v. Maricopa County*, 867 F.2d

ceedings, I think the public, the bar, and the district judges would benefit from knowing the breakdown of the actual vote. For reasons I am not free to reveal, I believe that in the case before us disclosure of the vote would be particularly informative. For that reason, I am especially uncomfortable with the application of our secrecy rule; I will, however, comply with its dictates.

I can conceive of only one good reason for any of my colleagues to have voted against an en banc hearing in this case: because they believe that *Elder* can or will be sharply limited, and they therefore find it unworthy of en banc consideration. *Elder* is certainly susceptible to a future reading that leaves it with little or no significance. The panel only applied its novel rule after expressly stating that doing so would not result in an injustice. *See Elder*, 975 F.2d at 1396. According to the panel, its holding does no injustice to Elder because consideration of the precedent which Elder failed to cite — *U.S. v. Al-Azzawy*[3] — would have made no difference to the outcome of his case. The panel said that even considering *Al-Azzawy*:

> . . . we are hard pressed to say that the law was so clearly established that a reasonable law enforcement officer in Holloway's shoes would understand that what he was doing violated a constitutional right. *See Ward v. County of San Diego*, 791 F.2d 1329, 1332 (9th Cir. 1986) (the court does not "require of most government officials the kind of legal scholarship normally associated with law professors and academicians"), *cert. denied*, 483 U.S. 1020, 107 S. Ct. 3263, 97 L. Ed. 2d 762 (1987).

Id.

In light of the panel's implicit admission that the result in *Elder* would have been the same with or without the proclamation of its novel rule, it is tempting to dismiss the rule as mere *dicta*. That may be difficult to do here, however, because the rule appears to constitute the raison d'etre for the opinion. Nevertheless, future panels may well conclude that the *Elder* rule should not be invoked if doing so would lead to an unjust result — specifically, if its application would cause a civil rights plaintiff who would otherwise prevail to lose his case.[4]

Perhaps it is impatience that prevents me from simply awaiting that result. Doing so might well ensure a peaceful, dignified burial for the bizarre *Elder* rule. However, like Judge Kozinski, I do not believe it is appropriate to let a case which promulgates so glaring an error in so important an area of the law go unchallenged. Rather, I believe that, considering how significantly the *Elder* decision conflicts with precedent, practice, and our obligation to vindicate constitutional rights, we have a duty to correct the panel's error now. I believe we breach that duty by failing to take the case en banc. Thus, for the reasons I have expressed, and for those ably articulated by Judge Kozinski, I dissent from the order denying en banc review.

[3]784 F.2d 890 (9th Cir. 1985), *cert. denied*, 476 U.S. 1144 (1986).

[4]Judge Kozinski argues at n.1 of his dissent that, despite the language of the opinion, *Elder* cannot be interpreted to hold that the panel would have reached the same result if *U.S. v. Al-Azzawy* had been cited to the district court. He bases his argument on *his own* interpretation of *Al-Azzawy* and on the observation that it would be improper and illogical to invent a completely new legal doctrine in order to avoid considering a non-controlling case. Even if Judge Kozinski is correct that, properly construed, *Al-Azzawy* would require reversal of the district court, that cannot change the fact that the panel's view of *Al-Azzawy* was different. It was the panel's view that *Al-Azzawy* did not clearly establish the law, and it was on the basis of that interpretation of *Al-Azzawy* that the panel determined to apply its rule, believing that the result would not be affected. Thus, it is the panel's interpretation of *Al-Azzawy* that we must accept in construing its holding — not Judge Kozinski's. Similarly, that it was improper or illogical for the panel to promulgate a new legal rule under the circumstances present here does not change the fact that the panel did so. We cannot say that because the panel acted illogically or improperly, its opinion does not mean what its language plainly states.

an organization with a permanent legal staff of any size. Instead, the victims of civil rights violations must generally rely on lawyers who work in small law offices or as sole practitioners. These lawyers are usually overburdened and rarely have access to the resources and facilities available to the average attorney representing corporate or governmental clients. They are consequently more apt to miss a case than are their governmental opponents. In sum, while we do not yet know whether *Elder* is even *formally* neutral between civil rights plaintiffs and defendants, it is evident that as a practical matter it is not, and that it is the plaintiffs who will ordinarily fall victim to its inequitable strictures.

I emphasize that no other litigant — whether suing for an antitrust, tort, contract, or copyright violation — risks forfeiture of his right to have the controlling law applied to his case simply because he neglects to cite the appropriate precedent in the district court. For all other litigants, and in all other circuits, the law is the law, *regardless* of the citation of cases below and *regardless* of the quality of the plaintiff's lawyer; for a Ninth Circuit civil rights plaintiff faced with a qualified immunity defense, however, the law is only controlling if his lawyer brings the particular case to the attention of the district court. Only in a civil rights case and only in our circuit can the failure to cite a particular decision render a federal appellate court powerless to provide a remedy for a blatantly unconstitutional act. Civil rights victims in the Ninth Circuit will thus be doubly victimized: first by a state or local official's violation of their constitutional rights; next when they seek to recover the damages to which they are entitled.

In this case, the panel may not invoke the familiar mantra that the result it reaches, however unjust, is ordained by precedent. No court has ever before concluded that decisional law is *lex non grata* or *loi disparu* if not cited to the district court, nor has any court ever before recognized the existence of the hybrid entity which the panel oxymoronically labels "legal fact." On the contrary, in at least three cases our court

has expressly acknowledged its obligation to look beyond the cases cited by the parties in analyzing qualified immunity issues. *See* Kozinski, J., dissenting *supra* at 591. That the panel is itself solely responsible for the establishment of the paradoxical *Elder* rule is further evident from the fact that the rule was neither proposed nor discussed by the parties in their briefs. The panel's *sua sponte* invention of a rule which seriously disadvantages civil rights plaintiffs displays a disregard both for precedent and for the rights of the individuals involved.[1]

As Judge Kozinski notes, our en banc process is imperfect. In this respect it is no different from other judicial, governmental, or electoral processes. Misfires occur in all walks of life. However, one aspect of the error we commit here is unique. Under our rules, when we decide not to go en banc, the public is prohibited from learning how the court divided over the issue. The public is even prohibited from learning whether a majority of the court voted against en banc review.[2] The secrecy surrounding our en banc procedure is unhealthy. *See discussion in Harris v. Vasquez*, 949 F.2d 1497, 1539 (9th Cir. 1990) (Reinhardt, J., dissenting), *cert. denied*, 112 S. Ct. 1275 (1992). As in *Harris*, and as in all other en banc pro-

[1]There is little comfort that an adherent of constitutional rights can take from *Elder*. It is worth noting, however, that while the panel attempts to tie our hands, it has *not* sought to change the district court's traditional role. Even under *Elder*, district courts knowledgeable in the law will continue to apply the relevant law whether or not it has been cited by the plaintiff. *See Elder*, 975 F.2d at 1396.

[2]In our circuit, an en banc call can be defeated even when a majority of the court does not vote against an en banc hearing. En banc review occurs only when an absolute majority of active judges votes in the affirmative. Thus, a tie vote will always defeat an en banc call. Similarly, a call will fail if a majority of those voting cast a "yes" vote but the "yes" votes do not outnumber the combined "no" votes and abstentions. *See generally Harris v. Vasquez*, 949 F.2d at 1539.

I should add that even where, as here, a dissent from an order denying en banc review is filed, the public cannot tell how many judges favored an en banc hearing. Judges who vote in favor of en banc review frequently do not join the dissent.

LYNN, SCOTT & HACKNEY

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF IDAHO

CHARLES K. ELDER and BEVERLY S. ELDER, husband and wife, Plaintiffs, v. R. D. HOLLOWAY, AND OTHER UNKNOWN EMPLOYEES AND AGENTS individually, and in their official capacity as police officers for the Ada County Sheriff's Office; VAUGHN KILLEEN, as Sheriff of Ada County; and the COUNTY OF ADA, Defendants.	)	CIVIL NO. 88-1329 **MEMORANDUM OPINION AND ORDER**

I. FACTS AND PROCEDURE

This suit arises out of the arrest and seizure of the plaintiff, Charles Elder, on April 27, 1987. The defendants in this action are Lieutenant R. D. Holloway, the officer in charge of the arrest, Ada County Sheriff Vaughn Killeen, who was present during the arrest, the County of Ada, and other unknown employees and/or agents. After receiving certified copies of two Florida arrest warrants for the arrest of Mr. Elder, Defendant Holloway made arrangements to arrest Mr. Elder in a public place, his place of work. However, before Mr. Holloway could arrest Mr. Elder at his place of work, Mr. Elder and his brother William

Elder, who also worked at the same place, got word of the officer's intent, and left work early. Lt. Holloway and other officers, after finding out that the Elders had left work, proceeded to William Elder's residence, which was where Charles Elder was also residing at the time. The officers, once they arrived in the area, set up surveillance of the residence. They observed the Elder brothers loading what appeared to be camping equipment into a pickup. William Elder then was seen riding away from the home on horseback. The officers detained William, and confirmed with William that his brother was still in the house. William also told the officers that his brother had access to several firearms in the home. The officers then attempted to make telephone contact with Charles, but were unsuccessful until William used the police loudspeaker to convince Charles to answer the phone. By this time, other officers had arrived near the area and had blocked off the roads coming into the neighborhood. During the telephone conversation between Charles and William, the officers were advised that Charles had fallen inside the house after he suffered an epileptic seizure. During this conversation, Plaintiff Elder suffered another seizure. After he had recovered from this second seizure, Lt. Holloway began speaking on the phone with Charles. Lt. Holloway advised Charles that if he could not walk out of the house, then he should crawl out. After a few minutes, Charles did walk out of the residence.

However, upon exiting the house, he took one step, turned slightly, and fell face down, hitting his head on the concrete walk which caused severe injuries. Emergency medical technicians were then called, and they arrived, treated Mr. Elder and transported him to the hospital.

Plaintiffs, Mr. Elder and his alleged common law wife, filed this suit on September 30, 1988. Three of the counts in the complaint pertain to alleged violations of 42 U.S.C. § 1983, and two counts deal with common law tort claims. Plaintiffs claim that the arrest was a violation of Mr. Elder's constitutional rights which require that the defendants have a valid Idaho arrest warrant before seizing him in his home.

On June 1, 1989, the plaintiffs moved for partial summary judgment on Count One as against Lt. Holloway on the issue of liability. On July 6, 1989, the defendants filed their memorandum in opposition to this motion. The defendants, on August 30, 1990, filed their Motion for Summary Judgment. On October 19, 1990, the plaintiffs filed their memorandum in opposition to this motion, and on October 29, 1990, the defendants filed their reply brief.

On November 6, 1990, this court held a hearing on all pending motions to address the cross-motions for summary judgment. Having thoroughly reviewed the statements of counsel, along with the memoranda, affidavits, and exhibits in the record,

and based upon the analysis to follow, the court has determined that defendants' Motion for Summary Judgment should be granted.

II. ANALYSIS

A. Summary of Cross-Motions

1. Plaintiffs' Motion for Partial Summary Judgment.

In this motion, plaintiffs seek summary judgment against Defendant Holloway on Count One as to his liability only. Count One is a claim against Lt. Holloway and his subordinates for the unreasonable seizure of Mr. Elder, which in turn resulted in Mr. Elder sustaining severe brain damage by his fall. Plaintiffs argue that without a valid Idaho arrest warrant, the defendants could not arrest Mr. Elder in his brother's home, unless there were exigent circumstances for a warrantless arrest. This is clearly the law, and the defendants do not dispute this. State v. Bradley, 106 Idaho 358, 679 P.2d 635 (1984) (where the court held that the officers cannot make a warrantless nonconsentual entry in the home of the suspect to arrest him, without exigent circumstances); Payton v. New York, 445 U.S. 573 (1980).

Plaintiffs argue that for all practical purposes, the arrest occurred in the home because Mr. Elder was restrained in the home, once the defendants "constructively crossed" the threshold of the home by surrounding the home and requesting by police loudspeaker and telephone that Mr. Elder come out. Memorandum in Support of Motion for Partial Summary Judgment, filed June 1, 1989, at 5-6. In support of this argument, the

plaintiffs point to the following "undisputed facts": (1) several armed officers surrounded the house; (2) roadblocks were established in the area of the residence; (3) plaintiff's brother William was detained and prevented from returning to his home; (4) Lt. Holloway did intend to arrest Charles Elder; and (5) a police loudspeaker and telephone were utilized to communicate with Mr. Elder that he should surrender. *Id.* at 7.

2. Defendant's Motion for Summary Judgment.

Initially, the defendant sets forth the prima facia case for establishing a 42 U.S.C. § 1983 claim. Simply stated, the plaintiffs must prove: (1) that the conduct complained of was committed by a person under the color of state law, and (2) that the conduct deprived the plaintiff of a constitutional right. Rinker v. County of Napa, 831 F.2d 829, 831 (9th Cir. 1987). There is no dispute as to the first element. However, the defendants argue that none of plaintiff's constitutional rights were violated.

Defendants' arguments can be summarized as follows.

(a) The arrest conducted outside the home was valid even without a valid Idaho arrest warrant. The defendants note that the plaintiffs argue that even though Idaho statutory law[1] can be interpreted as allowing an arrest without a warrant, the case law clearly requires that the officers have a valid Idaho arrest warrant to arrest an individual in his home. The defendants do not clearly dispute this; they simply attempt to distinguish Bradley and Payton, and argue that the arrest was made outside the home. Memorandum in Support of Motion for Summary Judgment, filed August 30, 1990, at 8-10.

(b) If the court finds that this was a constructive entry, then the arrest was still valid because there existed probable cause (based on the information received and the existence of the Florida warrants) and Mr. Elder was in plain view. *Id.* at 10-11. However, the court finds that this argument clearly does not take into consideration the courts' findings in Bradley, Payton, and United States v. Santana, 427 U.S. 38 (1976).

(c) Exigent circumstances existed that would excuse the arrest warrant requirement. Citing a variety of authorities, defendants set forth several factors which justify a finding of exigent circumstances in this case: (1) suspect believed to be wanted for crime of violence, (Elder was wanted for aggravated battery) United States v. Salvador, 740 F.2d 752 (9th Cir. 1984); (2) suspect believed to be armed (several individuals informed the officers that Elder possessed and had access to guns, and in addition, sources had stated that Elder told them that he would

[1] Idaho Code § 19-4514 (1987) provides in part: "The arrest of a person may be lawfully made . . . without a warrant upon reasonable information that the accused stands charged with a felony by the courts of another state . . . ."

not be arrested and would shoot it out with police) *id.*; (3) there was a clear showing of probable cause (the magistrate's signature on Florida warrants) United States v. Davis, 785 F.2d 610 (8th Cir. 1986); (4) suspect believed to be in the premises (officers saw Elder enter the house) People v. Abney, 407 N.E.2d 543 (1980); (5) likelihood of flight (brothers packing camper) United States v. Williams, 612 F.2d 735 (3d Cir. 1979); and (6) entry can be peaceable and during daylight hours (officers gave Elder an opportunity to surrender, the only possible entry was telephone contact with Elder, and these events occurred during the day) United States v. Davis, 785 F.2d 610 (8th Cir. 1986). Based on these factors, the defendants argue that a constructive entry was necessary in order to prevent the potential harming of others inside or outside the premises which was located in a residential area. Memorandum in Opposition to Plaintiffs' Motion for Partial Summary Judgment, filed July 6, 1989, at 18-23; Memorandum in Support of Motion for Summary Judgment, filed August 30, 1990, at 11-12.

(d) If the court finds that no exigent circumstances existed, then the defendants are still protected by qualified good faith immunity doctrine. The defendants note that this is an affirmative defense that must be proved by them; however, they note that courts have granted summary judgment on this issue if the pleadings and affidavits indicate that there are no genuine issues of material fact. *Id.* at 12 (*citing* Harris v. City of

Roseburg, 664 F.2d 1121, 1129 (9th Cir. 1981), and Kipps v. Ewell, 538 F.2d 564, 566 (4th Cir. 1976)).

According to the defendants, the test for whether or not they are entitled to qualified immunity under the facts is, "[s]hould a reasonable person in the shoes of the individual police officer have known that he was violating another's . . . clearly established constitutional rights?" Memorandum in Support of Motion for Summary Judgment, filed August 30, 1990, at 14 (*citing* Ngiraingas v. Sanchez, 858 F.2d 1368, 1374 (9th Cir. 1988), *aff'd* ___U.S. ___, 110 S.Ct. 1737 (1990)). Applying this standard, the defendants claim that Lt. Holloway knew he could not enter the home without a warrant; however, he in good faith believed he could serve the warrants outside the home in public without a valid Idaho warrant. Defendants argue that the law is unclear in Idaho, as to whether there can be a "constructive entry," and therefore, defendants' conduct did not violate clearly established statutory or constitutional law. Memorandum in Support of Motion for Summary Judgment, filed August 30, 1990, at 12-14.

(e) There is no affirmative link between the alleged violations and the adoption of a policy authorizing the alleged misconduct; therefore, the claims against Ada County and the Sheriff should be dismissed. Under the law, a municipality

cannot be held liable on a respondeat superior theory unless there exists an affirmative link between the violations complained of and the adoption of any plan or policy of the agencies or persons showing authorization or approval of the misconduct. Monell v. Department of Social Serv. of New York, 436 U.S. 658, 691 (1978); Rizzo v. Goode, 423 U.S. 362, 370 (1976). The defendants also cited a Sixth Circuit case which, in addressing this standard, stated:

> The result of Rizzo, and subsequent cases in the lower federal courts applying the standards it announced is that a failure of a supervisory official to supervise, control, or train the offending individual officers is not actionable absent a showing that the official either encouraged the specific incident of misconduct or in some other way directly participated in it. At a minimum a plaintiff must show that the official at least implicitly authorized, approved, or knowingly acquiesced in the unconstitutional conduct of the offending officers.

Hays v. Jefferson County, Kentucky, 668 F.2d 869, 874 (6th Cir.), *cert. denied*, 459 U.S. 833 (1982).

Applying this standard, the defendants argue that there is no evidence that Sheriff Killeen's or Ada County's failure to supervise or train their officers caused any injury to the plaintiffs. There is no evidence in the record to indicate that these officials in any manner authorized, approved or knowingly acquiesced in the alleged unconstitutional conduct of the

officers making the arrest.[3] Memorandum in Support of Motion for Summary Judgment, filed August 30, 1990, at 17-18.

In addition, the defendants in oral arguments cited the court to Pembaur v. Cincinnati, 475 U.S. 469 (1986), a United States Supreme Court decision where the court further clarified the defendants' position that Ada County and the Sheriff cannot be found liable under Section 1983 because they did not make a deliberate choice to make public arrests in the manner executed by Lt. Holloway in this case. In Pembaur, the Court stated:

> We hold that municipal liability under § 1983 attaches where--and only where--a deliberate choice to follow a course of action is made from among various alternatives by the official or officials responsible for establishing final policy with respect to the subject matter in question.

Id. at 483-84.

---

[3] It should be noted that according to Lt. Holloway's deposition, the Sheriff, although present at the scene, did not give any orders or take part in the arrest.

> "Q All right. Now, was the sheriff himself involved---I'm talking Vaughn Killeen---in this incident?
>
> "A [Lt. Holloway] He was at this incident.
>
> "Q Okay. What was his role?
>
> "A He didn't do anything, other than he was there, observed what was happening, and obviously was my supervisor. But as far as giving directions on this situation, he was not involved in it."

Reply Memorandum in Support of Motion for Summary Judgment, filed Oct. 29, 1990, Excerpts of Holloway Deposition at 18.

(f) Count Four of the Complaint falls within Idaho Code § 6-904, and therefore should be dismissed. Idaho Code § 6-904[3] provides for governmental immunity for false arrests. Defendants' claim that the plaintiffs in Count Four are seeking damages against Ada County and the Sheriff for injuries they sustained as a result of a false arrest, and that pursuant to Section 6-904, these parties are not liable for these claims. They also assert that the plaintiffs cannot seek redress for both a Section 1983 claim and a common law tort claim, because these claims both seek the same relief. Memorandum in Support of Motion for Summary Judgment, filed August 30, 1990, at 18-19.

(g) The consortium loss claim, Count Five, should also be dismissed as it is wholly derivative of the other claims. Defendants argue that if the other counts are dismissed, then this count fails as a matter of law as a consortium claim is a derivative claim. Runcorn v. Shearer Lumber Prod., Inc., 107 Idaho 389, 394, 690 P.2d 324, 329 (1984). Defendants also assert

---

[3]Idaho Code § 6-904 (1990) provides in part that:

> A governmental entity and its employees while acting within the course and scope of their employment and without malice or criminal intent shall not be liable for any claim which:
>
> . . . .
>
> 3. Arises out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation . . . . (emphasis added)

that the claim should fail because the plaintiffs were not married at the time Mr. Elder was injured. They were divorced in 1974 and lived with each other off and on through February of 1987. They reject plaintiffs' argument that they had a valid common law marriage, and argue that Florida law does not recognize common law marriages after 1967. Memorandum in Support of Motion for Summary Judgment, filed August 30, 1990, at 19-20.

In their reply brief, defendants assert that Michigan law also does not recognize common law marriages after 1957, so that Idaho would be the only law that the plaintiffs could make this claim under. They argue that a close reading of Beverly Elder's deposition will indicate that no common law marriage existed in Idaho. They claim that in the deposition, Ms. Elder indicates that when they lived in Idaho, they did not live together, nor did they consider themselves married.

B. Analysis of Pending Motions.

1. The validity of the arrest.

The threshold question that this court must address as it considers these cross-motions for summary judgment is, whether or not it is clearly established in Idaho law that an officer, under the circumstances of this case--where officers surrounded the house, requested the individual to exit the house and that individual complies--must have a valid Idaho arrest warrant in order to arrest that individual. This court finds that there is no clearly established statutory or case law in Idaho or the

Ninth Circuit which addresses this issue. It is not disputed among the parties that if the arrest would have actually occurred in the home, then the officers would have had to have a valid Idaho arrest warrant, and possibly a valid Idaho search warrant[4].

The Idaho Supreme Court in State v. Bradley, 106 Idaho 358, 670 P.2d 635 (1983), following the law announced by the United States Supreme Court in Payton v. New York, 445 U.S. 573, 577 (1980), found that absent exigent circumstances or consent, officers must have a valid Idaho arrest warrant to enter a defendant's private residence in order to make an arrest, even if the officers have a valid arrest warrant from a sister state. The law in this area, where this is an actual entry into the home, is, therefore, clearly established.

Unfortunately, that is where the clarity ends. The court has found no Idaho or Ninth Circuit law which addresses the issue of whether a valid Idaho arrest warrant is necessary in order to make a "constructive entry" into the home to make an arrest. The court was also unsuccessful in finding any law in Idaho or the Ninth Circuit that addresses the issue of what constitutes a "constructive entry" or "constructive crossing of the threshold."

---

[4] The search warrant may have been required in that the home that Charles Elder was residing in at the time, the home at which the arrest was made, was the home of his brother, William Elder. The court notes that this issue was not addressed by the parties, and therefore, this court will not review this issue.

The plaintiffs cite the court to two cases, State v. Holeman, 103 Wash.2d 426, 693 P.2d 89 (1985), and Scroggins v. State, 276 Ark. 177, 633 S.W.2d 33 (1982), which they claim are persuasive in this area. However, neither of these cases are directly on point, and neither case is from this state or this circuit. In Holeman, the officers who executed the arrest reached through the doorway and physically grabbed the individual who was standing in the doorway. The court there held that this was clearly a crossing of the threshold which required an arrest warrant.

In Scroggins, the court dealt with the situation in which the officers knocked on the door of the suspects' motel room and when the suspects answered, they pulled their guns and ordered the suspects out of the house. Once the suspects exited the motel, the officers effectuated the arrest. The court does not find Holeman and Scroggins persuasive as they both are clearly distinguishable from the case at bar. In the case at bar, the officers did not physically cross the threshold to grab Mr. Elder by the arm and pull him out of the house, nor did the officers knock on the door, wait for Mr. Elder to answer, and then pull their guns on him and demand that he come out of the house.

The case law in this area clearly supports the view that the significant point of analysis is the threshold, and that if the person is outside his doorway, in an area with public

access, then he no longer has the protection of requiring a warrant. State v. Bradley, 106 Idaho 358, 679 P.2d 635 (1984); United States v. Karagozian, 715 F.Supp. 1160 (D.Conn. 1989) (where the court held that a secluded rear deck of a home still has the same privacy expectations as the home because this is not a place, like the driveway, with ready access to visitors, nor was it visible to the public). Based on this analysis, the court finds that once Mr. Elder stepped out of the front door of his brother's house, onto the public access sidewalk of the home, a public arrest was made unless he can show that he did not exit the house voluntarily, or unless he can show that the area where he was arrested was secluded from public access and deserving of the same expectation of privacy as the home itself. These questions clearly present genuine issues of material facts that prevent this court from entering summary judgment on this issue.

The Eighth Circuit, in Duncan v. Storie, 869 F.2d 1100 (8th Cir.), *cert. denied*, ___ U.S. ___, 110 S.Ct. 85 (1989), addressed a similar question concerning similar facts. In Duncan, the plaintiff brought a Section 1983 claim, alleging unlawful arrest and excessive use of force. The main question in the case was whether a public arrest occurred in the doorway of the plaintiff's house. Because the court found that there existed genuine issues of material fact concerning whether or not a public arrest was made, the court refused to grant summary

judgment. The court summed up the law in this area very clearly when it stated:

> Depending upon whether Duncan was arrested in his home or outside in a public place, different standards apply . . . . If an individual voluntarily left the confines of his home, as Storie and Whitted claim that Duncan did, then the arrest was made in a public place. United States v. Santana, 427 U.S. 38, 42, 96 S.Ct. 2406, 2409, 49 L.Ed.2d 300 (1976). Under these circumstances, the individual has no expectations of privacy and the arresting officers need only demonstrate that there was probable cause in order to justify a warrantless arrest. . . . However, a warrantless arrest that occurs inside an individual's home is unconstitutional unless the officers demonstrate the existence of probable cause and exigent circumstances.
>
> The doorway of an individual's home or apartment or hotel room may be a public place for the purpose of making a warrantless arrest *if the individual has come to stand in the doorway voluntarily*. *See* United States v. Whitten, 706 F.2d 1000, 1015 (9th Cir. 1983). However, an individual who is *compelled* to stand in a doorway cannot be lawfully arrested without the existence of probable cause and exigent circumstances.

Duncan v. Storie, 869 F.2d at 1102 (citations and footnote omitted) (emphasis added).

The Duncan court emphasized that the focus should not be on the exact location of the individual in relation to the doorway, but instead, the crucial issues are whether the individual had an expectation of privacy, and whether the individual came to the door voluntarily. *Id.* Applying this law, the court, in denying defendant's motion for summary judgment, found that it could not hold as a matter of law, that the individual "voluntarily placed himself in a public place and

willingly relinquished the expectation of privacy that he is entitled to when he is within his home." *Id.* at 1103.

Applying this analysis to the facts in this case provides the court with ample grounds to deny plaintiffs' Motion for Partial Summary Judgment, and defendants' Motion for Summary Judgment on the issue of whether the arrest was valid. The court finds that there still are genuine issues of material fact concerning whether Mr. Elder placed himself voluntarily in a public place, and whether he willingly relinquished his expectation of privacy. As noted above, the defendants argue that they did not coerce Mr. Elder out of the home, but instead, that Mr. Elder's brother was the one who talked to Mr. Elder on the phone and police loudspeaker. They further assert that if Mr. Elder would not have come out into the public place voluntarily, *then* they would have obtained an Idaho search and arrest warrant. The court finds that there is ample evidence to support a finding that there still exists genuine issues of material fact on this issue.

2. Exigent circumstances.

If this court were to hold that there was a "constructive entry" into the home, and therefore, the defendants had to obtain a valid Idaho arrest warrant, the defendants argue that the warrant requirement would be excused because of the existence of exigent circumstances. As noted above, the defendants cite several factors that Lt. Holloway testified to in his deposition

that constitute exigent circumstances. Despite conceding that Mr. Elder was wanted for felony charges in Florida, and that he said he would not be arrested, and that he had access to guns in the house, plaintiffs argue that these factors alone or together do not constitute exigent circumstances. Plaintiffs' Response to Defendants' Memorandum in Support of Motion for Summary Judgment, filed Oct. 19, 1990, at 5-6.

Plaintiffs argue that under Michigan v. Tyler, 436 U.S. 499, 509 (1978), the unifying question under the case law for determining whether exigent circumstances exist, is whether or not "there is compelling need for official action and no time to secure a warrant." Plaintiffs assert that the warrantless entry should be upheld only if there was "a 'compelling need' to avoid an imminent risk of danger to life or property, destruction or loss of evidence, or escape of the suspect." Plaintiffs' Response to Defendant's Memorandum in Support of Motion for Summary Judgment, filed on Oct. 19, 1990, at 6-7 (citation omitted).

The plaintiffs assert that the facts indicate that this was not an exigent circumstance because the police had planned the arrest five days before the incident, and that the police themselves created the exigency by surrounding the home and ordering Mr. Elder out of the house. They argue that there was not a compelling need to suspend the warrant requirement because there was not any risk of danger to anyone, there was no risk of

evidence being destroyed, and there was no risk of flight. *Id.* at 7-10. These assertions alone clearly create genuine issues of material facts. This court, therefore, finds that whether or not, under these circumstances, exigent circumstances existed to excuse the requirement that officers have a valid Idaho arrest warrant is a question of fact, which prevents this court from entering summary judgment in favor of the defendants on this issue.

3. Qualified immunity.

This court's analysis on whether or not there was a valid arrest under the circumstances in this case controls the outcome on the issue of qualified immunity. Plaintiffs, under their Section 1983 claims, argue that they are entitled to recover against the defendants because the defendants violated clearly established constitutional rights, specifically, Mr. Elder's right not to be arrested in his brother's home without a valid Idaho arrest warrant. Defendants assert that even if the court were to find that a valid Idaho arrest warrant was required to make an arrest, and even if the court found that there were no exigent circumstances to justify the warrantless arrest, the court must still find in favor of the defendants because they are protected by the doctrine of qualified good faith immunity. The court is persuaded by defendants' argument.

In Malley v. Briggs, 475 U.S. 335 (1986), the Supreme Court, in further defining the qualified immunity standard set

forth in Harlow v. Fitzgerald, 457 U.S. 800 (1982), stated: "Defendants will not be immune if, on an objective basis, it is obvious that no reasonably competent officer would have concluded that a warrant should issue; but if officers of reasonable competence could disagree on this issue, immunity should be recognized." Malley v. Briggs, 475 U.S. at 341. *See also*, Los Angeles Police Protective League v. Gates, 907 F.2d 879, 887-88 (9th Cir. 1990).

In terms of this case, the defendants restate this standard as "whether no reasonable officer could have believed that an Idaho warrant was not required for an arrest upon Bill Elder's front porch." Memorandum in Opposition to Plaintiff's Motion for Partial Summary Judgment, filed July 6, 1989, at 15. In Ngiraingas v. Sanchez, 858 F.2d at 1374, the Ninth Circuit, in adopting the Third Circuit's standard, stated that:

> Deciding whether a police officer has acted in good faith is no easy task. As a general matter, however, we note that good faith immunity is judged "by an objective standard, not by examination of the subjective state of mind of the officer." . . . *The relevant question is . . . "[W]ould or should a reasonable person in the shoes of the individual police officer have known that he was violating another's . . . clearly established constitutional rights . . ."*?

Id. (citation omitted) (emphasis added).

As stated above, the law is clearly established that absent consent or exigent circumstances, officers must obtain a valid arrest warrant prior to crossing the threshold of a home to arrest an individual. State v. Bradley, 106 Idaho 358, 670 P.2d

635 (1983); Payton v. New York, 445 U.S. 573, 577 (1980). However, the law is not clear--in fact, the court has found no controlling Idaho or Ninth Circuit case law--on the issue of "constructive crossing of the threshold." The law is uncertain as to what even constitutes a "constructive crossing." These questions appear to be questions of fact, that must be dealt with on a case-by-case basis. There is certainly no statutory or case law that provides that a constructive crossing of the threshold occurs when the officers surround the house, and then attempt to make contact with the individual in the home.

Therefore, the defendants in this case could not have been violating plaintiff's clearly established rights when the law was far from certain as to when a constructive entry occurs, and there exists no official policy relating to getting a suspect out of his home by telephone or police loudspeaker. There is no way that any individual officer, under the circumstances of this case, could have known that he was violating another's clearly established constitutional rights when those rights were not yet clearly established. Until the law is better defined, it appears to this court that officers in similar circumstances could make an arrest outside the home if they in good faith believed that they could effectuate the arrest without violating any clearly established constitutional rights. The officers in this case clearly acted reasonably under the circumstances as it was their understanding of the law, and it was provided for in Ada County's

arrest and custody policy[3], that as long as they made the arrest outside the home, they could make the arrest without an Idaho arrest warrant. It appears from the record that the officers reasonably believed that their actions were constitutional; therefore, no liability attaches to their actions.

4. Application of summary judgment standard.

In Harris v. City of Roseburg, 664 F.2d 1121 (9th Cir. 1981), the Ninth Circuit, in addressing the doctrine of qualified good faith immunity, has stated that even though this defense is an affirmative defense that must be proved by the police officers, summary judgment is still appropriate if the pleadings and affidavits indicate that there are no genuine issues of material fact. In affirming the district court's granting of summary judgment in favor of the police officers, the court stated:

> "The non-movant has an affirmative duty to come forward to meet a properly supported motion for summary judgment . . . ." [W]e find that the affidavits and depositions set forth facts, which, if accepted, would entitle Bergman [the officer] to summary judgment. With respect

---

[3] *See* Exhibit D attached to Plaintiffs' Response to Defendants' Memorandum in Support of Motion for Summary Judgment, filed October 19, 1990, which is a copy of Ada County's "arrest and custody" policy that was in effect at the time of the arrest.

> to Bergman's good faith defense, plaintiff has not raised any triable issues of fact as to whether Bergman reasonably believed that his actions were proper.

Id. at 1129-30 (citation omitted).

It is well settled that a party in defending against a motion for summary judgment may not simply rest upon the bare pleadings.[6] As the Ninth Circuit stated in United States v. Allen, 578 F.2d 236 (9th Cir. 1978): "In order successfully to oppose a motion for summary judgment, a party may not rely solely on conclusory allegations in the pleadings . . . but must, instead, offer some evidence at least outlining a factual dispute." *Id.* at 237 (citations omitted).

Moreover, under Rule 56, it is clear that an issue in order to preclude entry of summary judgment must be *both* "material" and "genuine." An issue is "material" if it affects the outcome of the litigation. An issue, before it may be considered "genuine," must be established by "sufficient evidence

---

[6] *See also* Fed. R. Civ. P. 56(e), which provides in part:

> "When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleadings, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is an genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party."

U.S.C.S. Rules of Civil Procedure, Rule 56(e) (Law. Co-op. 1987 & Supp. 1990).

supporting the claimed factual dispute . . . to require a jury or judge to resolve the parties' differing versions of the truth at trial." Hahn v. Sargent, 523 F.2d 461, 464 (1st Cir. 1975) (*quoting* First Nat'l Bank of Arizona v. Cities Serv. Co., Inc., 391 U.S. 253, 289 (1968)). The Ninth Circuit cases are in accord. *See e.g.*, British Motor Car Distrib., Ltd. v. San Francisco Automotive Indus. Welfare Fund, 882 F.2d 371 (9th Cir. 1989).

According to the Ninth Circuit, in order to withstand a motion for summary judgment, a party

> (1) must make a showing sufficient to establish a genuine issue of fact with respect to any element for which it bears the burden of proof; (2) must show that there is an issue that may reasonably be resolved in favor of either party; and (3) must come forward with more persuasive evidence than would otherwise be necessary when the factual context makes the non-moving party's claim implausible.

Id. at 374 (citation omitted).

The court finds that on the issue of whether the officers acted in good faith when they arrested Mr. Elder without a warrant outside his brother's home, the plaintiffs have failed to raise any triable issues of fact as to whether Lt. Holloway believed that his actions were proper.

C. Conclusion

Based on the foregoing analysis, the applicable standards under Rule 56, and the direction given by the Ninth Circuit in considering these issues, the court finds under the doctrine of qualified good-faith immunity, the defendants are entitled to

summary judgment. Because all the other claims asserted by the plaintiffs are derivative of the claims against the officers--that is, without a finding that the officers had violated plaintiffs' rights, the plaintiffs could not prevail on their other claims--the court finds that Ada County and Sheriff Vaughn Killeen are also entitled to summary judgment. The plaintiffs have failed to offer any evidence of an official policy of Ada County or the Sheriff's Department, which would make them liable under Section 1983. Plaintiffs' claim for loss of consortium must also fail as a matter of law, as this claim is wholly contingent upon plaintiffs' success on the underlying tort claims. Runcorn v. Shearer Lumber Prod., Inc., 107 Idaho 389, 394, 690 P.2d 324, 329 (1984).

III. ORDER

Based on the foregoing and the court being fully advised in the premises,

IT IS HEREBY ORDERED that plaintiffs' Motion for Partial Summary Judgment, should be and hereby is, DENIED in its entirety.

IT IF FURTHER ORDERED that defendants' Motion for Summary Judgment, should be and hereby is, GRANTED.

DATED this 20 day of November, 1990.

HAROLD L. RYAN
UNITED STATES DISTRICT JUDGE

JAMES J. DAVIS
ATTORNEY AT LAW
P.O. BOX 8126
960 BROADWAY, SUITE 302
BOISE, IDAHO 83707

TELEPHONE (208) 336-3244

FACSIMILE (208) 336-3374

May 28, 1993

RECEIVED
JUN - 3 1993
OFFICE OF THE CLERK
SUPREME COURT, U.S.

Clerk of the Court
Supreme Court of the United States
1 First Street, NE
Washington, D.C. 20543

Re: Case No. 92-8579
Elder v. R. D. Holloway, et al

Dear Clerk of the Court:

Enclosed are original and twelve copies of Respondents' Brief in Opposition to a Petition for a Writ of Certiorari and an original and one copy of a Proof of Service for filing with the Court in the above referenced matter. I have also enclosed an extra copy of the Brief and Proof of Service. Please conform the same with the Court's filing information and return them to me in the envelope provided.

Thank you for your assistance.

Sincerely,

James J. Davis

JJD/db

Enclosures

No. 92-8579

In The

SUPREME COURT OF THE UNITED STATES

April Term, 1993

COPY

CHARLES K. ELDER,

Petitioner,

v.

R. D. HOLLOWAY, AND OTHER UNKNOWN EMPLOYEES AND AGENTS, individually, and in their official capacity as police officers for the Ada County Sheriff's Office; VAUGHN KILLEEN as Sheriff of Ada County; and the COUNTY OF ADA,

Respondents.

Petition for Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

PROOF OF SERVICE

JAMES J. DAVIS
Attorney at Law
960 Broadway, Suite 302
P. O. Box 8126
Boise, Idaho 83707
Telephone: (208) 336-3244

Counsel of Record for Respondents

STATE OF IDAHO)
) ss:
County of Ada)

JAMES J. DAVIS, being first duly sworn, deposes and says that pursuant to Rule 29.5 of this Court, he served the within BRIEF IN OPPOSITION TO A PETITION FOR A WRIT OF CERTIORARI on counsel for Petitioner by enclosing a copy thereof in an envelope, first class postage prepaid, addressed to:

John C. Lynn
Lynn, Scott, Hackney & Sullivan
1015 West Hays
Boise, Idaho 83702

and depositing the same in the United States mail at Boise, Idaho on May 28, 1993.

JAMES J. DAVIS

SUBSCRIBED AND SWORN To before me this 28th day of May, 1993.

Notary Public for Idaho
Residing at: Boise
Commission Expires: 1/25/94

STATE OF IDAHO)
) ss:
County of Ada)

JAMES J. DAVIS, being first duly sworn, deposes and says that pursuant to Rule 29.5 of this Court, he served the within BRIEF IN OPPOSITION TO A PETITION FOR A WRIT OF CERTIORARI on counsel for Petitioner by enclosing a copy thereof in an envelope, first class postage prepaid, addressed to:

John C. Lynn
Lynn, Scott, Hackney & Sullivan
1015 West Hays
Boise, Idaho 83702

and depositing the same in the United States mail at Boise, Idaho on May 28, 1993.

JAMES J. DAVIS

SUBSCRIBED AND SWORN To before me this 28th day of May, 1993.

Notary Public for Idaho
Residing at: Boise
Commission Expires: 1/25/94

No. 92-8579

In The

SUPREME COURT OF THE UNITED STATES

April Term, 1993

CHARLES K. ELDER,

Petitioner,

v.

R. D. HOLLOWAY, AND OTHER UNKNOWN EMPLOYEES AND AGENTS, individually, and in their official capacity as police officers for the Ada County Sheriff's Office; VAUGHN KILLEEN as Sheriff of Ada County; and the COUNTY OF ADA,

Respondents.

Petition for Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

PROOF OF SERVICE

JAMES J. DAVIS
Attorney at Law
960 Broadway, Suite 302
P. O. Box 8126
Boise, Idaho 83707
Telephone: (208) 336-3244

Counsel of Record for Respondents